

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF NORTH CAROLINA**

DAVID CLARK, *et al.*,  
Plaintiffs,  
v.

Case No. 1:16-CV-01044-CCE-LPA

DUKE UNIVERSITY, *et al.*,  
Defendants.

KATHI LUCAS, *et al.*,  
Plaintiffs,  
v.

Case No. 1:18-CV-00722-CCE-LPA

DUKE UNIVERSITY,  
Defendant.

**MEMORANDUM IN SUPPORT OF JOINT MOTION TO CONSOLIDATE**

In accordance with Rule 42(a) of the Federal Rules of Civil Procedure, the parties respectfully request that the Court consolidate *Clark v. Duke University*, Case No. 1:16-cv-01044, with *Lucas v. Duke University*, Case No. 1:18-cv-0072. Both cases should be consolidated for settlement purposes only under Case No. 1:16-cv-01044. Because both actions involve common questions of fact and law, and consolidation would promote judicial efficiency, the Court should consolidate both actions for settlement purposes only.

**BACKGROUND**

This litigation is comprised of two separate but related underlying actions brought under 29 U.S.C. §1132(a)(2) of the Employee Retirement Income Security Act of 1974 (ERISA). The first action, *Clark v. Duke University*, Case No. 1:16-cv-01044,

commenced on August 10, 2016, and alleges that Defendant Duke University and other individually named defendants breached their duties under ERISA by causing the Duke University Faculty and Staff Retirement Plan (Plan) to pay unreasonable administrative expenses, maintaining underperforming investment options, engaging in prohibited transactions with parties-in-interest, and failing to remedy the breaches of the Plan fiduciaries. *See Clark Doc. 72.*

The second action, *Lucas v. Duke University*, Case No. 1:18-cv-00722, commenced on August 20, 2018, and alleges that Defendant Duke University breached its duties and committed prohibited transactions under ERISA by causing Plan assets to be used to pay for salaries and fringe benefits of Duke University employees who provided services to the Plan. *See Lucas Doc. 1.*

Both actions seek to enforce Duke University and/or the other individual Defendants' personal liability under 29 U.S.C. §1109(a) to make good to the Plan all losses resulting from each alleged breach and to restore the Plan all profits Duke University and/or the individual Defendants allegedly made through the use of Plan assets.

On January 16, 2019, the Settling Parties reached a settlement to resolve the claims asserted in *Clark* and *Lucas*. As a term of the Settlement Agreement, the Settling Parties agreed to consolidate *Clark* and *Lucas* for purposes of settlement only. *See Settlement Agreement, ¶3.2.1.*<sup>1</sup>

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<sup>1</sup> The Settlement Agreement has been filed as an attachment to Plaintiffs' Unopposed Motion for Preliminary Approval of the Class Action Settlement.

## ARGUMENT

“If actions before the court involve a common question of law or fact,” this Court may “consolidate the actions[.]” Fed. R. Civ. P. 42(a)(2). The Court also may “issue any other orders to avoid unnecessary cost or delay.” *Id.* at (a)(3). “A district court has ‘broad discretion’ regarding whether or not to consolidate cases.” *Fenix Flashlights, LLC v. Li*, No. 12-1310, 2015 U.S. Dist. LEXIS 132391, at \*4 (M.D.N.C. Sep. 30, 2015)(citation omitted). “[C]onsiderations of judicial economy favor consolidation.” *Hirtenstein v. Cempra, Inc.*, No. 16-1303, 2017 U.S. Dist. LEXIS 103799, at \*4 (M.D.N.C. July 5, 2017)(citation omitted).

The requirements for consolidation under Rule 42(a) are met. *Clark* and *Lucas* involve common questions of law. They both were brought under 29 U.S.C. §1132(a) on behalf of the Plan for breaches of fiduciary duties under ERISA seeking to enforce Duke University and/or Defendants’ personal liability under 29 U.S.C. §1109(a) to make good to the Plan all losses resulting from each breach of fiduciary duty and to restore to the Plan any profits made through Duke University and/or Defendants’ use of the Plan’s assets. *See Clark* Doc. 72 ¶¶1,5–6, 229–262; *Lucas* Doc. 1 ¶¶1–2, 48–59. Both actions also share numerous common questions of fact, including the same defined contribution plan, the same Plan fiduciaries and named fiduciary (Duke University) with authority over the control or management of the assets of the Plan, the same documents and instruments governing the Plan, common class representatives, and substantially

overlapping classes, among others. *See Clark* Doc. 72 ¶¶9–20, 225; *Lucas* Doc. 1 ¶¶5–13, 44.

An Order consolidating the class actions also will promote judicial efficiency and avoid unnecessary costs by: eliminating the need for the Court to manage two dockets, enter separate orders on matters related to the settlement, and potentially holding two hearings for settlement purposes; saving time and effort of the Settling Parties by eliminating the need to file separate motions or other necessary filings to facilitate the settlement; and avoiding any confusion or unnecessary administrative burdens through maintaining two separate but related actions.

### CONCLUSION

The Parties respectfully request that the Court consolidate *Clark* and *Lucas* under Case No. 1:16-cv-01044.

January 16, 2019

Respectfully submitted,

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### **CERTIFICATE OF COMPLIANCE**

In accordance with the Civil Local Rules of Practice for the United States District Court for the Middle District of North Carolina, this is to certify that the foregoing document complies with the font and point selections approved by the Court in Local Rule 7.3(d)(1). The foregoing was prepared on computer using Times New Roman font (13 point). I certify that the above-referenced Memorandum contains 713 words.

/s/ Jerome J. Schlichter

### **CERTIFICATE OF SERVICE**

I certify that on January 16, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will automatically send notification of filing to all counsel of record.

/s/ Jerome J. Schlichter